Supreme Court, U.S.
FILED

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No. 021613 APR 30 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

DIANE L. HOLBROOK,

Petitioner,

v.

ALLIED VAN LINES, INC.,
a foreign corporation,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DIANE L. HOLBROOK
Petitioner
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48 pp

QUESTIONS PRESENTED

1. Are clerical mistakes in judgments, orders or other parts of the record, and errors therein arising from oversight or omission when not corrected by the court at any time of its own initiative or on the motion of any party and after such notice, a violation of Rule 60(a) and Rule 55(a) and due process of law as guaranteed to Petitioner under the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Is the Magistrate Judge chargeable with any abuse of his power, since this is not the tribunal to which he is amenable (open to suggestion or advice) and he has no right to judge upon this matter, or power to afford redress if any is required? Does his actions constitute an abuse of discretion?

3. Only the "Notice Of Removal" of complaint was done by Appellee. Appellee did not do a Motion to be presented to the District Court and no Order, since no Motion was presented, allowed such removal to Federal Court. With only "Notice Of Removal" being on docket sheets and records readily available, is the Magistrate Judge of the District Court, as well as the presiding three Judges in the Court of Appeals, guilty of abuse of discretion? Or was this "an injustice" clerical error to prevent Appellant to file timely oppositions to be considered before any Orders are rendered? Appellant is unaware of any Motion or granting of Order to such Motion.

QUESTIONS PRESENTED – Continued

4. Did the District Court abuse its discretion when this court possesses the power to reinstate any cause, dismissed by mistake? So, if there were errors in the process, or through the default of the clerks, the same proceeding might be had to procure a reversal.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Petitioner submits the following list of interested persons and a complete list of Respondent's affiliates and parent corporations:

1. Administrative File
2. Allied Van Lines, Inc. a foreign corporation (Respondent)
3. Cedeno, Yvonne (district court clerk's operations supervisor)
4. Chavez, Esq., Gilda M. (counsel for Respondent)
5. Clayton, Dubilier & Rice per Respondent's Counsel's CIP and CDS
6. County Court of the 19th Judicial Circuit, Martin County, Florida or Courts of the 19th Judicial Circuit in Martin County, Florida
7. Dombroff & Gilmore, P.C. (law office for Respondent)
8. Holbrook, Diane L. (Petitioner)
9. Lynch, Jr., Honorable Magistrate Judge Frank J. (U.S. S. District)
10. Maddox, Clarence (court administrator/clerk of court – Miami)
11. Moore, Honorable Judge K. Michael (U.S. S. District – Miami)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT – Continued

12. North American Van Lines, Inc. per Respondent's counsel's CIP and CDS

13. Other (any federal clerk of court/court administrator – Miami)

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PETITION FOR A WRIT OF CERTIORARI

Diane L. Holbrook ("Holbrook") respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on December 3, 2002.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit that gives rise to this petition was not published. (App. 1-6). The February 3, 2003 order of the Eleventh Circuit denying the petition for rehearing is unreported. (App. 20). The orders of the district court are unreported.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its opinion and judgment on December 3, 2002. The Eleventh Circuit entered its order denying Holbrook's timely filed petition for rehearing on February 3, 2003. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

United States Constitution, Amendment XIV, § 1 provides, in relevant part:

> "No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Federal Rules of Civil Procedure Rule 60(a) provides Relief from Judgment or Order, in relevant part:

> "(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders."

28 U.S.C. § 1332 Part IV, Jurisdiction and Venue, provides Diversity of citizenship; amount in controversy; costs, in relevant parts:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between – (1)-(4) (unchanged).
>
> (b) Except when express provision therefor is otherwise made in a statute of the United States, where the [defendant] plaintiff who files the case originally [from County court by Removal] in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the [plaintiff] defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the [defendant] plaintiff and, in addition, may impose costs on the [defendant] plaintiff."

28 U.S.C. § 1337 clearly provides for "an action" means each action. This case has two separate actions. First action for Breach of Contract. Second action for Fraud. In relevant part, 28 U.S.C. § 1337 states:

> "Provided, however, That the District Courts shall have original jurisdiction of an action brought under . . . , only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs."

STATEMENT OF THE CASE

This is an action that exceeds $2,500.00 but does not exceed $15,000.00, and as such is within the jurisdiction of the County Court of the 19th Judicial Circuit In and For Martin County, Florida. Therefore, these actions should be remanded to this Court, exclusive of interest, costs, and punitive damages.

Defendant is a foreign corporation that is duly authorized to do business in Martin County, Florida. Plaintiff is an adult resident of Hobe Sound, Martin County, Florida, not in the military service.

Venue is proper in Martin County, Florida, since the causes of actions accrued in Martin County, Florida, and payment in full was *due* in Martin County. See actual delivery date Bill of Lading Number 3239299, dated November 4, 1996.

On or about October 17, 1996, Plaintiff contracted with Defendant for Defendant to move Plaintiff's property from Virginia to Florida. Defendant double billed $707.00 on Plaintiff's credit card dated on October 18, 1996.

On or about October 31, 1996, Defendant moved the Plaintiff's property from Virginia to Florida. As a result of Defendant's negligence, a substantial amount of the Plaintiff's property was lost, stolen or damaged.

As a result of the wrongful act, willful and wanton conduct, negligent acts, and created consequent emotional distress upon the Plaintiff by the Defendant, the Plaintiff demands punitive damages allowable by law and interest from date of occurrence and any attorney's fees that may arise.

This is an action for breach of contract. The Defendant breached the terms of the agreement of the contract.

Due to malicious actions of bad faith as well as misrepresentation and results of the wrongful act, willful and wanton conduct, negligent acts, etc. allegedly imposed by the Defendant. Punitive Damages would be recoverable under the breach of contract by law by the greater weight of evidences shown.

This is an action for fraud by misrepresentation of material facts, either intentionally and knowingly *or* innocently or negligently, with the intent that the court may rely on it.

This is an action for quantum meruit/unjust enrichment, in case, the Plaintiff were to have no adequate remedy at law. Defendant has been unjustly enriched due to the fact that it has benefited from being prepaid in full, but has failed to render all that is indicated by "These items are included in the Single Factor Charges." Defendant will therefore have gained a windfall unless relief is granted.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS INTERPRETATION OF RULE 60(a), F.R.C.P., 28 U.S.C.A., CONFLICTS WITH *NEW ENGLAND FURNITURE AND CARPET CO. V. WILLCUTS, COLLECTOR OF INTERNAL REVENUE*, 55 F.2D 983, 983-988 (D. Minn. 1931).

This case concerns the meaning of Rule 60(a) Federal Rules of Civil Procedure, 28 U.S.C.A. when it substantially affects the total outcome of cases. Refer to *New England Furniture & Carpet Co. v. Willcuts, Collector of Internal Revenue*, 55 F.2d 983, 983-988 (D. Minn. 1931). Refer to Petition for A Writ of Certiorari, *Diane L. Holbrook v. Nationwide Mutual Insurance Company, a foreign corporation*, (was not published) No. 01-31, which is affected by *United States v. Ohio Power Co.*, 353 U.S. 98, 77 S. Ct. 652, 1 L. Ed. 2d 683 (1957). (App. 28-30).

In the Matter of American Precision Vibrator Company v. National Air Vibrator Co., 863 F.2d 428, 428-432 (5th Cir. 1989) states as follows:

> "'The appeal in this case was triggered by a clerical mistake in the district clerk's office that led to the dismissal. . . . ' The district court held that the dismissal deprived the . . . court of the power to vacate the dismissal. We hold that Fed. R. Civ. P. 60(a) authorizes the court to undo the effect of the clerical mistake. Accordingly, we reverse the decision of the district court.
>
> "Application of Rule 60(a) requires us to balance two competing concerns. Equitable considerations mandate that we interpret the Federal Rules of Civil Procedure *liberally to avoid miscarriages of justice.*

> "A separate action at equity allowed courts to grant relief from judgments of other courts, even after the term had ended."

Also refer to *United States v. Ohio Power Co.*, 353 U.S. 98, 77 S. Ct. 652, 1 L.Ed.2d 683 (1957). (App. 28-30).

"Rule 60(a) authorizes courts to correct mistakes sua sponte, while Rule 60(b) requires a motion by a party. Because we hold that Rule 60(a) authorizes the correction made here, we need not decide that it could also be made under Rule 60(b). Rule 60(a) authorized it to correct the direct result of the mistake in the clerk's office." Refer to Petition for A Writ of Certiorari, *Diane L. Holbrook v. Nationwide Mutual Insurance Company, a foreign corporation*, (was not published) No. 01-31, which is affected by *United States v. Ohio Power Co.*, 353 U.S. 98, 77 S. Ct. 652, 1 L.Ed.2d 683 (1957). (App. 28-30).

II. THE COURT OF APPEALS INTERPRETATION OF 28 U.S.C. § 1332, AS WELL AS, 28 U.S.C. § 1337 CONFLICTS WITH THIS COURT'S INTERPRETATION OF THOSE SECTIONS.

Is the Magistrate Judge of the District Court chargeable with any abuse of his power? *See* (App. 8-15 and 24). Under 1, refer to 28 U.S.C. § 1332 Part IV(a) and also refer to 28 U.S.C. § 1337. Under 3, correction is to be made as shown on (App. 21-24). Under 4, *see* (App. 26-27). Beforehand, *see* (App. 16, 17, 25-27). Especially notice (App. 21-24) as a whole.

The District Court Judge and the Court of Appeals relied upon the Magistrate Judge's Report and Recommendation in its entirety.

This is, at the least, the second time that the Magistrate Judge of the District Court interfered with authorizing the clerk to correct mistakes sua sponte (Note that "sua sponte" means for the clerk themselves to correct) by (App. 18-19) as record and example done from the past. *See* Honorable District Court Judge's Order "required by law with respect to Plaintiff's Rule 60(a) Motion." Even after Ordered to do so, the Magistrate Judge denied the Order for the clerk to correct the court's clerical mistakes.

The Court of Appeals by (App. 1-6), at the least, does not refer to 28 U.S.C. § 1332 and also does not refer anywhere in their Order to Appellant's reference to 28 U.S.C. § 1337 as clearly defined under "an Action" means each action. This case has two separate actions, in relevant part: "Provided, however, That the District Courts shall have original jurisdiction of an action brought under . . . , only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs." Also notice that (App. 18) does not mention this. This has been presented clearly in (App. 21-24), filed Feb. 26, 2002, before (App. 8-15) was written.

III. THE DISTRICT COURT AND THE COURT OF APPEALS INTERPRETATION IS ERRONEOUS.

The Court of Appeals within (App. 4-5) using cases not associated with court clerical mistakes as described within Rule 60(a) Fed. R. Civ. P., 28 U.S.C.A. The first case mentioned is about the jury's clear intent as to award a single quantum of damages on both common law theories. However, nothing suggests that the jury clearly intended to make a single damage award. This case, obviously, has nothing to do with court clerical mistakes and therefore

should not be considered as a common law. The second case mentioned is about Fed. R. Evid 105 (Rule 105); whereas, the district court agreed that the jury could consider the evidence only in regards to Frederick's (Plaintiff's) motive to sue, . . . ". This case, obviously, has nothing to do with court clerical mistakes and therefore should not be considered as a common law.

IV. THE QUESTIONS PRESENTED ARE IMPORTANT.

Should court clerical mistakes, as allowed by sua sponte, be corrected within 30 days and not have to address the motion toward the court? Should penalties be assessed if not corrected past 60 days, unless a letter from the clerk states that correction is being delayed due to heavy workload and confirms that the letter is for the protection of the parties who brought the court clerical mistakes to their attention? A form of protection letter is required, at the least, of the court clerk. This should be added to Rule 60(a) Fed. R. Civ. P., 28 U.S.C.A. Environmentalists Act for, at the least, from readdressing throughout proceedings, as well as, Appeals to higher courts for corrections of court clerical mistakes would create substantial paper reduction.

For uniform rulings purpose, should Congress look at 28 U.S.C. § 1332 and reconstruct 28 U.S.C. § 1337 to both have a minimum sum or value of $75,000, exclusive of interest and costs etc? In the past, 28 U.S.C. § 1332 had been increased from a minimum sum or value of $50,000 to $75,000, a $25,000 increase factor. Even an increase factor of $25,000 to $35,000 of an action would slow down the growing stack that Assistant Attorney Generals have.

As further indicated in the Broward Metro Edition of the South Florida Sun-Sentinel of Sunday, October 29, 2000:

> "Same companies named repeatedly . . .
>
> "Moving abuses continue to be reported despite county laws. . . .
>
> "Among the companies with the most complaints are American Soldier Hero, Atlantic Express, Majesty, Nationwide and All American. All have aliases: ASH, Congress, Netking, Emerald, ***Allied Moving & Storage***."

[Emphasis added.] And as the caption under the picture of an Assistant Attorney General states:

> **GROWING STACK:** Assistant Attorney General . . . of the Economic Crimes Division, says that despite mounting complaints against moving companies that present customers with bills far higher than estimates, convictions are rare.

(App. 31).

CONCLUSION

For the foregoing reasons, Petitioner Diane L. Holbrook respectfully requests that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12030
Non-Argument Calendar

D.C. Docket No. 01-14198-CV-KMM

DIANE L. HOLBROOK,

Plaintiff-Appellant,

versus

ALLIED VAN LINES, INC.,
a foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

(December 3, 2002)

Before BIRCH, CARNES and HULL, Circuit Judges.

PER CURIAM:

Diane L. Holbrook appeals the grant of summary judgment to interstate carrier Allied Van Lines, Inc. ("Allied") on her claims of breach of contract and fraud associated with an agreement to move her personal property. The district court found that Holbrook's state-law claims were preempted by the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 14706, and

that Holbrook could not recover under the Amendment because she failed to comply with the notice-of-claim requirements on Allied's bill of lading. Holbrook, who proceeds *pro se*, argues on appeal that she should be heard on her state-law claims, and that, furthermore, the district court erred in denying her motion to correct clerical mistakes in the court's records, pursuant to Federal Rule of Civil Procedure 60(a), and in allowing the magistrate to conduct proceedings and enter pretrial orders. We find no error and AFFIRM.

I. GRANT OF SUMMARY JUDGMENT

Holbrook argues the district court erred in finding that the Carmack Amendment preempted her state law claims for breach of contract, fraud, and unjust enrichment, and that summary judgment was not warranted because Allied defaulted by not answering her amended complaint in a timely manner. We review a district court's grant of summary judgment *de novo*, applying the same standards as the district court. *Konst v. Fla. E. Coast Ry. Co.*, 71 F.3d 850, 852 (11th Cir. 1996). We must view the evidence and all factual inferences justifiably drawn from that evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986). Summary judgment is proper if the pleadings, depositions, and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986).

The Carmack Amendment, 49 U.S.C. § 14706, provides a uniform rule of carrier liability for goods shipped in interstate commerce and preempts state law claims against carriers covered by the statute. *Adams Express Co. v. Croninger*, 226 U.S. 491, 505-08, 33 S. Ct. 148, 151-53 (1913). We have held that the Carmack Amendment preempts any state law claim associated with a carrier's failure to discharge its contractual duty to deliver goods, including fraud and misrepresentation. *Smith v. United Parcel Serv.*, 296 F.3d 1244, 1247 (11th Cir. 2002). Holbrook's claims clearly are related to the delivery of goods, and, therefore, the district court did not err in concluding that Holbrook's common-law claims are preempted.

The district court also correctly found that Holbrook's claims could not proceed under the Carmack Amendment for failure to comply with the notice requirements under that statute. A claimant under the Carmack Amendment must give the carrier written notice of her claim, as set forth in the carrier's bill of lading, before bringing a civil lawsuit. 49 C.F.R. § 370.3(a). That written notice must give sufficient detail to make the carrier aware of the contours of the claim. 49 C.F.R. § 370.3(b).

Allied provided Holbrook with a bill of lading, and Section 6 of that document states that Holbrook was required to provide Allied with notice of any claims within nine months after delivery, and that any suit filed against Allied must be brought within two years and one day of its written notice denying the claim. These contractual limitations are consistent with those allowed by the Carmack Amendment. 49 U.S.C. § 14706(e)(1). The affidavit of Allied's representative states that Allied received no written notice within nine months of delivery. In rebuttal, Holbrook provided only a copy of a mailing receipt dated

November 19, 1996, with no other probative evidence as to what was sent or to whom. Consequently, for failure to demonstrate through competent evidence that Holbrook provided Allied with a written claim of her loss, the district court found that Holbrook's claims fail.

As to Holbrook's argument that Allied defaulted by not answering her amended complaint within ten days, we find that she was not eligible for a default judgment because she filed her amendment outside of the allowable period without permission from the court or the opposing party. *See* Fed. R. Civ. P. 15(a). Since the amendment of the complaint was not allowed under the Federal Rules, a default based on the opposing party's failure to respond to that amendment is not appropriate.

II. MOTION TO CORRECT CLERICAL MISTAKES

Holbrook argues that she was entitled to have several clerical mistakes corrected by the district court, as she requested and was denied in a motion pursuant to Federal Rule of Civil Procedure 60(a). We review a district court's Rule 60(a) ruling for abuse of discretion. *See Aquachem Co. v. Olin Corp.*, 699 F.2d 516, 520 (11th Cir. 1983) (holding that a district court has discretion to amend clearly erroneous special verdict to conform to intention of jury, which is analogous to correcting clerical error under Rule 60(a)).

The district court did not abuse its discretion by denying Holbrook's motion to correct clerical errors because the alleged errors were irrelevant. Even if the district court should have granted Holbrook's motion, any

failure to do so did not affect her substantial rights because the district court did not rely on these alleged errors in making its decision. *See* Fed. R. Civ. P. 61; *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1285 (11th Cir.) (holding that error in a court's ruling on a motion for mistrial will not be disturbed unless it affects substantial rights), *cert. denied*, 531 U.S. 813, 121 S. Ct. 46 (2000).

III. RULINGS BY MAGISTRATE JUDGE

Holbrook argues that the magistrate judge was not entitled to conduct any of the proceedings or enter any orders because both parties refused to allow the magistrate to conduct the entire proceeding. We review *de novo* whether a magistrate judge exceeded his statutory authority. *See Thomas v. Whitworth*, 136 F.3d 756, 758 (11th Cir. 1998).

With the permission of the parties, a magistrate judge may preside over and decide all matters in a case, up to and including trial. 28 U.S.C. § 636(c)(1). A district court, without the permission of the parties, may designate a magistrate judge to hear and rule on certain pretrial matters, of which summary judgment motions are specifically excluded. 28 U.S.C. § 636(b)(1)(A). For matters upon which a magistrate judge may not rule, the district court may request the magistrate to prepare a report and recommendation. 28 U.S.C. § 636(b)(1)(B). The magistrate judge's recommendations are not binding; the district court reviews them *de novo* after the parties have had an opportunity to file written objections. 28 U.S.C. § 636(b)(1)(B)-(C).

Here, the parties refused to allow the magistrate judge to hear the entire proceeding, as was their option

under 28 U.S.C. § 636(c)(1)-(2). However, this refusal did not override the district court's authority to assign certain pretrial matters to, or request non-binding recommendations from, the magistrate judge. The district court assigned these tasks to the magistrate judge pursuant to statutory authority. Therefore, Holbrook's argument is without merit.

IV. CONCLUSION

Upon review of the record and the district court's order, and upon consideration of the parties' briefs, we find no reversible error.

AFFIRMED.

United States Court of Appeals
For the Eleventh Circuit

No. 02-12030

District Court Docket No.
01-14198-CV-KMM

DIANE L. HOLBROOK,

Plaintiff-Appellant,

versus

ALLIED VAN LINES, INC.,
a foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

(Filed Dec. 3, 2002)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: December 3, 2002
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-14198-CV-MOORE/LYNCH

DIANE L. HOLBROOK,

Plaintiff,

vs.

ALLIED VAN LINES, INC.,
a foreign corporation,

Defendant.
_____/

REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (DE 13), REQUEST FOR ORAL ARGUMENT (DE 14), AND MOTION TO DISMISS COMPLAINT (DE 17).

(Filed Feb. 27, 2002)

THIS CAUSE having come to be heard upon an Order of Referral from the Honorable K. M. Moore of all pretrial matters, and this Court having reviewed the above motions, Plaintiff's responses, and Defendant's replies, recommends to the District Court as follows:

BACKGROUND

1. On or about October 17, 1996 the pro se Plaintiff, Holbrook, hired Defendant, Allied Van Lines, to move household belongings and furniture from Holbrook's Virginia residence to her Florida residence, pursuant to the terms set out in a uniform bill of lading. The Interstate Commerce Commission lists Allied Van Lines as an authorized common carrier by motor vehicle.

2. The bill of lading, signed by Holbrook, indicates "an actual delivery date" of November 4, 1996. Section 6, on the reverse side of the bill, further provides:

> As a condition precedent to recovery, a claim for any loss or damage, injury or delay must be filed in writing with carrier within nine (9) months after delivery to consignee as shown on face hereof, or in case of failure to make delivery, then within nine (9) months after a reasonable time for delivery has elapsed; and suit must be instituted against carrier within two (2) years and one (1) day from the date when notice in writing is given by carrier to the claimant that carrier has disallowed the claim or any part or parts thereof specified in the notice. Where a claim is not filed or suit is not instituted thereon in accordance with the foregoing provisions, carrier shall not be liable and such claim am [sic] will not be paid."

3. Four years later on October 16, 2000, Holbrook filed suit in the County Court of the 19th Judicial Circuit, Martin County, Florida. Holbrook alleged that Allied Van Lines negligently moved her property resulting in $15,000.00 in damages.

4. Claiming federal subject matter jurisdiction, Allied petitioned to have the case removed to federal court, which was granted on July 6, 2001. On August 21, 2001, the Hon. K. M. Moore set the case for jury trial to begin on July 29, 2002. Thereafter, Allied's pretrial motions, referenced above, as well as Holbrook's "Amended Complaint" and other responses were filed.

DISCUSSION

5. This action involves the interstate shipment and transportation of goods from Virginia to Florida. As a recognized common carrier, the issue of Allied's liability is governed by the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 14706. *See Universal Manufacturing Corp. v. Associated Rigging and Hauling Corp.*, 773 F.Supp. 549, 550 (E.D.N.Y. 1991). This Court has venue pursuant to 49 U.S.C. § 14706(d)(3) and 28 U.S.C. § 1331.

6. This Court turns first to Allied's Motion to Dismiss Holbrook's Amended Complaint. Allied argues that the amendment is procedurally improper and fails to state a claim of relief.

7. After Allied filed its Motion for Summary Judgment, Holbrook filed her Amended Complaint (DE 15) without leave of court. In addition to challenging venue, the Amended Complaint raises the claims of breach of contract, fraud, and unjust enrichment. However, the time for amending as a matter of course had passed because the case had already been set for trial. *See* Fed. R. Civ. P. 15(a). This Court construes the Amended Complaint as a response to the Motion for Summary Judgment. For this reason, this Court recommends that the Motion to Dismiss be denied and that the Amended Complaint remain a part of the reviewable record.

8. Allied also moves to dispose of this case through summary judgment and in support thereof, raises the same argument that Holbrook fails to state a claim for relief. Namely, Allied submits that Holbrook's common law causes of action are preempted by the Carmack Amendment; that any claim brought under the Act is barred for

failure to comply with pre-suit requirements; and that if actionable, punitive damages are not recoverable.

9. Generally stated, a movant is entitled to summary judgment if there is no genuine issue of material fact, leaving final judgment to be decided as a matter of law. *See* Fed.R.Civ.P. 56, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 578 (1986). Summary judgment is also warranted if a movant can show an absence of evidence to support the non-moving party's case. *See Barclay, Inc. v. Stewart & Stevenson Services, Inc.*, 761 F.Supp. 194 (D. Mass. 1991) (reviewing motion for summary judgment in context of a 49 U.S.C. § 14706 action). On rebuttal, the burden shifts to the nonmoving party to affirmatively provide sufficient evidence that a genuine issue for trial remains. *See* Fed.R.Civ.P. 56, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986), *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). Mere assertions are insufficient to survive a motion for summary judgment. *See* Fed.R.Civ.P. 56(e), *Anderson*, 477 U.S. 252. *See also, LTA Group, Inc. v. J.B. Hunt Transport, Inc.*, 101 F.Supp.2d 93, 97 (N.D.N.Y. 2000), *Landess v. N. American Van Lines, Inc.*, 977 F.Supp. 1274, 1278 (E.D. Texas 1997) .

10. The issue of whether the Carmack Amendment preempts common law causes of action can be decided as a matter of law on summary judgment. *See United Van Lines, Inc. v. Shooster*, 860 F.Supp. 826, 828 (S.D. Fla. 1992). As discussed in *Shooster*, a "multitude of precedents . . . clearly indicates that the Amendment preempts virtually any state law claim" against an interstate common carrier. *Id.* In this case, Holbrook, as shipper/consignee, contracted with Allied, as carrier, under a

bill of lading and properly invoked the rules and regulations found in 49 U.S.C. § 14706. *Cf. Barclay*, 761 F.Supp. at 205 (holding that Barclay's failure to participate in interstate tariff regulation and use of a straight, rather than uniform bill of lading, rendered the notice of claim requirement inapplicable). Holbrook's common law and state causes of action are preempted, and accordingly, this Court recommends that Allied's Motion for Summary Judgment with respect to those counts be granted.

11. With common law claims precluded, Holbrook must show compliance with certain pre-suit requirements to maintain an action for liability under the Carmack Amendment. At issue in this case is whether Holbrook filed a proper notice of claim with Allied in compliance with 49 U.S.C. § 14706(e).

12. The first condition precedent to bringing suit is the filing of a claim for damages within nine (9) months of delivery. The purpose of the notice is to facilitate the carrier's prompt investigation of claims and the compilation of reliable records. *See Culver v. Boat Transit, Inc.*, 782 F.2d 1467, 1469 (9th Cir. 1986), *LTA Group*, 101 F.Supp. at 97. To inform shippers on how to provide adequate, useful notice, certain minimal requirements have been promulgated. *See* 49 C.F.R. §§ 370.3, 1005.2. These standards require notice to be written; filed with the carrier; and contain 1) sufficient facts to identify the property, 2) an assertion of liability for the alleged loss or damage, and 3) a determinable money amount for total damages claimed.

13. These requirements are strictly construed; it is not enough to show that the attempted notice substantially complies. *See Landess*, 977 F.Supp. at 1280.

Consequently, oral notice, or even a carrier's actual knowledge of damage is insufficient. *See Culver*, 782 F.2d at 1469. Notations of damage on various documents, such as bills or delivery receipts, as well as claims for uncertain amounts, are also insufficient. *See* 49 C.F.R. §§ 370.3(c), (d) and 1005.2(c), (d). Rather, the written notice must be provided in the proper forum so that it is clear when a formal claim is being made.

14. In support of its Motion for Summary Judgment, Allied relies primarily on an affidavit of its Administrative Manager for Claims Services which states that " . . . Holbrook has never filed a written notice of claim with Allied Van Lines, Inc. in accordance with the terms and conditions of the bill of lading. Further, until Allied Van Lines, Inc. was served with this complaint on June 8, 2001, we had no notice of this claim." The date of filing suit falls well outside the nine month time period for providing notice.

15. In response, Holbrook states that she did provide timely notice. She explains that she attached a handwritten list of damages (Exhibit 16 to Plf's DE 19, 21) to a Shipper's Inventory Sheet, made certain telephone calls, and sent a letter to Allied, as proven by a November 19, 1996 U.S. Post Office receipt of $5.20 for an unspecified service. (Exhibit 1 to Plf's DE 24, 25). However, these assertions remain unsubstantiated and do not rise to the level of affirmative evidence required to refute Allied's affidavit. There is no proof, direct or otherwise, that Holbrook attempted to comply with the minimum notice requirements, much less proof of strict compliance as required by case law. Therefore, the evidence fails to establish this element of a 49 U.S.C. § 14706 cause of action.

16. The statue of limitations for bringing a civil action against the carrier begins to run on the date the carrier gives its notice that it has disallowed the claim. *See* 49 U.S.C. § 14706(e)(1). Thus, the other condition precedent to bringing suit is to obtain the carrier's denial of the claim for damages. Although Holbrook makes assertions that she filed a proper, written notice of claim with the carrier, no where does she allege receipt of a denial of claim. Failing to comply with this requirement is also grounds for summary judgment. *See Universal Manufacturing Corp.*, 773 F.Supp. at 550, *Gulf & Western Industries, Inc. v. Old Dominion Freight Line, Inc.*, 633 F.Supp. 688, 690 (M.D.N.C. 1986).

17. Based on the record before it, this Court finds no genuine issue of fact, reasonably in dispute that Holbrook complied with either pre-suit requirement. Allied's Motion for Summary Judgment as to the 49 U.S.C. § 14706 action should therefore granted. This Court does not pass on whether Holbrook may seek punitive damages.

ACCORDINGLY, this Court recommends to the District Court that the Defendant, Allied Van Line's Motion for Summary Judgment (DE 13) be **GRANTED** as to Plaintiff, Holbrook's common law and 49 U.S.C. § 14706 causes of action. In light of summary judgment, this Court further recommends that Defendant's Motion to Dismiss (DE 17) and Request for Oral Argument (DE 14) be **DENIED**.

The parties shall have ten (10) days from the date of this Report and Recommendation within which to file objections, if any, with the Honorable K. M. Moore, United States District Judge assigned to this case.

DONE AND SUBMITTED at Fort Pierce in the Northern Division of the Southern District of Florida, this 27th day of February, 2002.

/s/ Frank J. Lynch, Jr.
FRANK J. LYNCH, JR.
UNITED STATES
MAGISTRATE JUDGE

CC:
Hon. K. Michael Moore
Diane Holbrook, pro se.
Gilda Chavez, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FT. PIERCE DIVISION

Case No. 01-14198-CIV-MOORE

DIANE L. HOLBROOK,

Plaintiff,

vs.

ALLIED VAN LINES, INC.,

Defendant.

_____/

ORDER REQUIRING RESPONSE

(Filed Aug. 6, 2001)

This matter came before the Court *sua sponte*. The parties are to file, within ten (20) days from the date of this Order, a joint statement as to whether, pursuant to 28 U.S.C. § 636(c), both parties consent to the United States Magistrate Judge conducting all proceedings in this case, including trial and entry of final judgment. The parties are advised that they are free to withhold consent without adverse substantive consequences. *See* Fed. R. Civ. P. 73(b). A joint statement as to whether the parties consent must be filed with this Court regardless of whether the parties choose to consent.

DONE AND ORDERED in Chambers at Miami, Florida, this 6th day of August, 2001.

/s/ K. Michael Moore
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

Copies provided:
United State Magistrate Judge Frank J. Lynch
Diane L. Holbrook, *Pro Se*
Gilda M. Chavez, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-14198-CIV-MOORE/LYNCH

DIANE L. HOLBROOK,

Plaintiff,

v.

ALLIED VAN LINES, INC.,

Defendant.

_____/

ORDER ON PLAINTIFF'S MOTION FOR ALL CLERICAL MISTAKES ON ALL RECORDS TO BE CORRECTION

(File stamped February 26, 2002)

THIS CAUSE having come on to be heard upon the above captioned motion and this Court having reviewed the motion and being otherwise fully advised, it is

ORDERED AND ADJUDGED that the motion is hereby **DENIED**.

DONE AND ORDERED this 27 day of February, 2002, at Fort Pierce, Northern Division of the Southern District of Florida.

/s/ Frank J. Lynch, Jr.
FRANK J. LYNCH, JR.
UNITED STATES
MAGISTRATE JUDGE

Copies furnished:
Diane L. Holbrook, pro se
P.O. Box 1512
Hobe Sound, FL 33475

Gilda M. Chavez-Hernandez, Esq.
201 South Biscayne Boulevard
Suite 1700
Miami, FL 33131

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12030-FF

DIANE L. HOLBROOK,

Plaintiff-Appellant,

versus

ALLIED VAN LINES, INC.,
a foreign corporation,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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(Filed Feb. 3, 2003)

BEFORE: BIRCH, CARNES and HULL, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant Diane L. Holbrook is DENIED.

ENTERED FOR THE COURT:

/s/ Stanley F. Birch
UNITED STATES CIRCUIT JUDGE

ord-41

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION

Case No.: 01-14198-CV-MOORE

DIANE L. HOLBROOK,

Plaintiff

vs.

ALLIED VAN LINES, INC.
a FOREIGN CORPORATION,

Defendant

_____/

PLAINTIFF DIANE L. HOLBROOK'S MOTION FOR ALL CLERICAL MISTAKES ON ALL RECORDS TO BE CORRECTED

(Filed Feb. 26, 2002)

COMES NOW the Plaintiff, DIANE L. HOLBROOK, moves this Court to demand that the Court Clerk corrects all clerical mistakes on all records pursuant to Rule 60(a) of the Federal Rules of Civil Procedure stating under (a) Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the MOTION OF ANY PARTY and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected. . . .

1. This has previously been brought to the attention of this Court.

(a) Nature Of Suit is #110 Breach Of Contract.

(b) Jurisdiction: 28 U.S.C.S. 1332 used for Federal Question.

(c) Demand is not $0,000. as noted on Court screen at the District Court. Amended Complaint break down is as follows:

(1) Breach Of Contract part is Ten Thousand Dollars ($10,000.00), plus interest, costs, punitive damages, attorney's fees, and any and all additional damages which this Court deems appropriate and just and allowable under law.

(2) Fraud part is Five Thousand Dollars ($5,000.00), plus interest, costs, punitive damages, attorney's fees, and any and all additional damages which this Court deems appropriate and just and allowable under law.

Under part (1) using the § 1337 clearly states this Court shall have original jurisdiction of AN ACTION . . . , only if the matter in controversy for each receipt or bill of lading exceeds $10,000., exclusive of interest and costs. Under part (1), it is only $10,000.00 and does not exceed that amount and is also noted as Breach Of Contract.

Under part (2) using the § 1337 clearly states this Court shall have original jurisdiction of AN ACTION . . . , only if the matter in controversy for each receipt . . . exceeds $10,000., exclusive of interest and costs. Under part (2), it is only $5,000.00 and does not exceed that amount and is noted as alleged Fraud.

Therefore, both part (1) and part (2) add up to the combined actions of Fifteen Thousand Dollars ($15,000.00) etc. . . . Law clearly states "an Action". "An action" means one action. This case is two actions combined totalling.

(d) Any and all Court Clerical mistakes on all records past, present, and future.

WHEREFORE, the Plaintiff, Diane L. Holbrook prays this Honorable Court grants the Order of Plaintiff Diane L. Holbrook's Motion For All Clerical Mistakes On All Records To Be Corrected. Plaintiff, Diane L. Holbrook on a separate Order prays this Honorable Court will have this case REMAND back to County Court Of The 19th Judicial Circuit as a Federal Question finally answered for Jurisdictional proceedings.

Dated: February 26, 2002

Respectfully submitted,

/s/ Diane L. Holbrook
Diane L. Holbrook
P. O. Box 1512
Hobe Sound, Florida 33475-1512
Telephone: 1 (772) 545-9793

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been furnished via FAX to Defendant per request and United States Mail to: Gilda M. Chavez, Esquire, 1700 Miami Center, 201 S. Biscayne Blvd., Miami, Florida 33131 on this the 26th day of February, 2002.

/s/ Diane L. Holbrook
Diane L. Holbrook
Plaintiff

FJL CLOSED
APPEAL

U.S. District Court
FLS – Southern District of Florida Ft. Pierce

CIVIL DOCKET FOR CASE #: 01-CV-14198

Holbrook v. Allied Van Lines Filed: 07/06/01
Assigned to: K. Michael Moore
Demand: $0 Nature of Suit: 450
Lead Docket: None Jurisdiction: Federal Question
Dkt # in 19th Jud. Cir. Ct. is 00-1346-CC

Cause: 28:1441 Notice of Removal

DIANE L. HOLBROOK plaintiff	Diane L. Holbrook [COR LD NTC] [PRO SE] PO Box 1512 Hobe Sound, FL 33475
v.	
ALLIED VAN LINES, INC., a foreign corporation defendant	Gilda M. Chavez-Hernandez FTS 670-4846 [COR LD NTC] Dombroff & Gilmore Miami Center 201 S Biscayne Boulevard Suite 1700 Miami, FL 33131 305-670-4843

07/06/01	1	NOTICE OF REMOVAL of complaint from: 19th Judicial Circuit Court FILING FEE $150.00 RECEIPT # 845112; A-7; Magistrate Judge John J. O'Sullivan (tdj) [Entry date 07/09/01]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION

CASE NO.: 01-14198-CIV-MOORE

DIANE L. HOLBROOK,

Plaintiff

vs.

ALLIED VAN LINES, INC.,
a foreign corporation,

Defendant

_____/

NOTICE OF REFUSAL TO PROCEED BEFORE A UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of 28 U.S.C. § 636(c), the parties to the above-captioned civil mater hereby request to proceed before a District Judge of this Court and refuse to have a United States Magistrate Judge conduct any and all further proceedings in the case (including the trial) and order the entry of judgment. Any appeal shall be taken to the United States Court of Appeals for this Judicial Circuit, in accordance with 28 U.S.C. § 363(c)(3).

/s/ Diane L. Holbrook
Diane L. Holbrook, *Pro Se*
Plaintiff

/s/ Gilda M. Chavez
Gilda M. Chavez,
Esquire
Counsel for Allied Van Lines, Inc.

Dated: August 8, 2001

M5409

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 98-14246-CIV-MOORE

DIANE L. HOLBROOK,

Plaintiff,

vs.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant.

_____/

ORDER OF REFERENCE TO MAGISTRATE

(Filed Jun. 4, 2001)

PURSUANT to 28 U.S.C. § 636 and the Magistrate Rules of the Local Rules of the Southern District of Florida, the above-captioned Cause is referred to United States Magistrate Judge Lynch to take all necessary and proper action as required by law with respect to Plaintiff's Rule 60(a) Motion, filed May 15, 2001.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st day of May, 2001.

/s/ K. Michael Moore
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

copies provided:

United States Magistrate Judge Lynch

Diane Holbrook, *pro se*
PO Box 1512
Hobe Sound, FL 33475

Raoul G. Cantero III, Esq., Counsel for Defendant

UNITED STATES v. OHIO POWER CO.

No. 312, October Term, 1955

SUPREME COURT OF THE UNITED STATES

353 U.S. 98; 77 S. Ct. 652; 1 L. Ed. 2d 683; 1957 U.S. LEXIS 1628; 57-1 U.S. Tax Cas. (CCH) P9537; 51 A.F.T.R. (P-H) 12; 1957-1 C.B. 523

Certiorari denied October 17, 1955 – Rehearing denied December 5, 1955 – Rehearing again denied May 26, 1956 – Order denying rehearing vacated June 11, 1956 April 1, 1957, Decided

SUBSEQUENT HISTORY:

Certiorari denied October 17, 1955. Rehearing denied December 5, 1955. Rehearing again denied May 26, 1956. Order denying rehearing vacated June 11, 1956. Rehearing and certiorari granted and case decided April 1, 1957.

PRIOR HISTORY: ON PETITION FOR REHEARING.

DISPOSITION: 131 Ct. Cl. 95, 129 F.Supp. 215, reversed.

CORE TERMS: finality, untimely, leave to file, continued existence, expiration, petitioned, vacated, timely petition, inherent power, happened, criminal case, sua sponte, reconsideration, consecutive, successive, clarification, out-of-time, companion, deferred, belated, vacate, Paragraph Of Rule, Revised Rules, national defense, amortization, overturning, constructed, accelerated, disturbing, initiative

SUMMARY: A taxpayer filed a suit in the United States Court of Claims to recover an alleged overpayment of taxes, asserting that it was entitled under 124(f) of the

Internal Revenue Code of 1939 to accelerated amortization of the full cost of wartime facilities which it had constructed, and not merely of that part of the cost which the War Production Board had certified as necessary in the interest of national defense. The Court of Claims, sustaining this contention, entered judgment in favor of the taxpayer (131 Ct Cl 95, 129 F Supp 215). The Supreme Court denied certiorari on October 17, 1955 (350 US 862, 100 L ed 765, 76 S Ct 104). The government's petition for rehearing was denied on December 5, 1955 (350 US 919, 100 L ed 805, 76 S Ct 192). A second petition for rehearing was denied on May 28, 1956 (351 US 958, 100 L ed 1480, 76 S Ct 844). On June 11, 1956, the order of December 5, 1955, was vacated by the Court sua sponte (351 US 980, 100 L ed 1495, 76 S Ct 1044), so that the present case might be disposed of consistently with two other cases then pending and presenting the same question. In these cases – United States v Allen-Bradley Co. 352 US 306, 1 L ed 2d 347, 77 S Ct 343, and National Lead Co. v Commissioner, 352 US 313, 1 L ed 2d 352, 77 S Ct 347 – the Supreme Court decided against the taxpayer.

Although Supreme Court Rule 58, paragraph 4, provides that consecutive petitions for rehearing, and petitions for rehearing that are out of time, will not be received, the Supreme Court granted the petition for rehearing in the present case, vacated the order denying certiorari, granted the petition for certiorari, and, upon the authority of the cases last cited above, reversed the judgment of the Court of Claims. In a Per Curiam opinion four members of the Court rested the decision on the ground that the interest in finality of litigation must yield where the interests of justice so require.

Harlan, J., with the

[Petition For A Writ Of Certiorari Case #1 No. 01-31 Diane L. Holbrook v. Nationwide Mutual Insurance Company, a foreign corporation was not published Case #2 No. [new] Diane L. Holbrook v. Allied Van Lines, Inc. a foreign corporation was not published.]

Discount movers pile up complaints

Low-ball estimates result in inflated bills

Same companies named repeatedly

By MITCH LIPKA
CONSUMER WRITER

It was to be a simple move across town, the kind thousands of South Floridians make every month.

They didn't have much stuff and they were only moving a few miles, so Mike and Laura Hargrove figured their move would cost $450. Five hundred, tops.

But after the movers had loaded the family's things aboard their truck earlier this year, the Hargroves learned the telephone quote of $57 an hour from Century Express Van Lines in Sunrise didn't cover everything.

Bubble wrap. Long carry. Stairs. Packing. Travel time. All extra charges.

After the Hargroves' goods were securely locked on the truck, the movers handed them a bill: $1,989.

"Highway robbery," Mike Hargrove fumed.

It was the Hargroves' first time on a journey that hundreds of South Florida consumers take every year: the move from hell.

The *Sun-Sentinel* reviewed more than 700 complaints filed with government regulatory agencies against local movers since the mid-1990s. Still more are filed with the Better Business Bureau — and untold consumers never file complaints.

At least 200 of the complaints filed since 1997 are directed at a group of moving companies controlled by about a half-dozen related people.

They have operated under an ever-changing array of names, shuf-

■ MOVERS continues on 28A

GROWING STACK: Assistant Attorney General Robert R. Julian, of the Economic Crimes Division, says that despite mounting complaints against moving companies that present customers with bills far higher than estimates, convictions are rare. Staff photo/Lou Toman

COMPLETE COVERAGE INSIDE

■ MOVING ABUSES CONTINUE TO BE REPORTED DESPITE COUNTY LAWS. 29A

■ WHO THE PRINCIPALS ARE AND WHAT THEY OWN. 29A

■ HOW TO AVOID RUNNING INTO PROBLEMS WHEN YOU MOVE. 29A

■ WHOM TO CALL TO CHECK UP ON A MOVER OR FILE A COMPLAINT. 28A

BEST AVAILABLE COPY

(2)

No. 02-1613

Supreme Court, U.S.
FILED
OCT 29 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DIANE L. HOLBROOK,

Petitioner,

v.

ALLIED VAN LINES, INC.,
a foreign corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR REHEARING

DIANE L. HOLBROOK
Petitioner
Post Office Box 1512
Hobe Sound, Florida 33475-1512
Telephone (772) 545-9793

6

QUESTIONS PRESENTED

Pursuant to 28 U.S.C. § 1337, petitioner originally filed Complaint in the County Court of the 19th Judicial Circuit in and for Martin County, Florida on October 16, 2000 exceeding $2,500, but does not exceed $15,000, and as such is within the jurisdiction of the County Court, exclusive of interest, costs, and punitive damages. The respondent was served from County Court. On July 6, 2001, the respondent paid filing fee of $150, and filed a "Notice of Removal" of complaint from County Court to United States District Court without a motion to be presented and without an order to do so, since no motion was presented. Therefore, petitioner submits that the following are more accurately phrased questions:

1. Especially when the public has reasonably relied on a differing concept, whether prospective application of a given decision is entirely a question of law must establish a new principle of law by either, overruling clear past precedent on which litigants have relied, or, by deciding an issue of first impression whose resolution was not clearly foreseen and, therefore, is freely reviewable.

2. Since no order granted such removal to District Court, whether under 28 U.S.C. § 455(a) and under 28 U.S.C. § 144 involving a recusal and disqualification of the Judges before whom the matter is pending having a personal bias or prejudice either against petitioner or in favor of any adverse party.

PETITIONER'S PETITION FOR REHEARING

Diane L. Holbrook respectfully requests that this Court grants the petition for rehearing seeking review of the petitions for a writ of certiorari vacating denied and certiorari(s) granted and rehearing granted. Pursuant to Rule 44 of this Court's Rules, this petition has been filed within 25 days of the denial of the petition(s) for a writ of certiorari.

REASONS FOR GRANTING THE REHEARING

Respondent(s) signed waiver(s) to not file oppositions to petition(s) for writ of certiorari.

The issues involves case(s) of first impression because it presents an entirely novel question of law that was never before considered by any court which seeks clarification of statutory interpretations, especially when the public has reasonably relied on a differing concept. *Larsen v. Sioux Falls School District #49-5 and Rockwood Insurance Company*, 509 N.W.2d 703. "Appellate courts are empowered and justified in confining the effect of a decision of first impression or of novel or unexpected impact to prospective application if considerations of fairness and justice, related to reasonable surprise and prejudice of those affected, seem to call for such treatment. It may also apply to cases of first impression which seek clarification of statutory interpretations, especially when the public has reasonably relied on a differing concept." "Prospective application of a given decision is entirely a question of law and, therefore, is freely reviewable. In making this determination, there are three factors that must be considered: (1) the decision to be applied prospectively must establish a new principle of law by either, overruling clear past

precedent on which litigants have relied, or, by deciding an issue of first impression whose resolution was not clearly foreseen; (2) the court must weigh the merits and demerits of each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further retard its operation; and (3) the court must determine whether the decision would produce substantial inequitable results if applied retroactively."

Only the "Notice Of Removal" of complaint was done by respondent. Respondent did not do a Motion Of Removal to be presented to the District Court and no Order, since no motion was presented, allowed such removal to Federal Court. Therefore, under 28 U.S.C. § 455(a) a recusal is required when a reasonable person would harbor doubts about judge's impartiality. Furthermore, respondent's Summary Judgment should be vacated for a violation of 28 U.S.C. § 455(a). Under 28 U.S.C. § 144 disqualifies the Judge before whom the matter is pending having a personal bias or prejudice either against him/her or in favor of any adverse party.

A court must find that the moving parties demonstrated the following three elements: (1) excusable neglect in failing to respond; (2) meritorious defenses; and (3) that the party acted with due diligence in seeking relief from a default judgment entitled to petitioner. Parties must show (1), (2), and (3) in order to obtain relief from a default judgment. *Lehner v. Durso*, 816 So.2d 1171 (Fla. App. 4 Dist. 2002). Amended Complaint was filed in the County Court of the 19th Judicial Circuit in and for Martin County, Florida and no answer has been filed in this County Court to this date resulting into a no answer default judgment against the respondent.

SUMMARY OF THE ARGUMENTS

Since the respondent, Allied Van Lines, Inc., does not intend to file a response in opposition to the petition for a writ of certiorari by signing a waiver to this Court indicates having no arguments or counter questions would be reasoning to grant the petition for writ of certiorari in full favor of the petitioner.

The issues involved pursuant to case(s) of first impression has to do with original jurisdiction of original filing in the County Court pursuant under 28 U.S.C. § 1337 clearly provides for "an action" means each action. This case has two separate actions. In relevant part of the first impression, 28 U.S.C. § 1337 states:

> "Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11706 or 14706 of title 49, *only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.*"

Examples of petitioner's interpretation of 28 U.S.C. § 1337 like shipper inventory number G041859 damaged #61 wicker chair has wicker's broken and missing box #69 would be one (according to law written as *each bill of lading*). Receipt Number B 5444 showing double billed paid would be one (according to law written as *each receipt*). Each receipt, as well as, each bill of lading are each less than $10,000. Therefore, County Court has 100% jurisdiction over matters of this case.

Amended Complaint was filed and served upon respondent back at the first week of September, 2001 in the County Court and no answer has been provided to the County Court itself, therefore a default judgment against the respondent should be entered. Rule 60(a) clerical

mistake(s) in judgments, orders or other parts of the record, and errors therein arising from *oversight or omission* when not corrected by the court at any time of its own initiative . . . , a violation of Rule 60(a) or Rule 1.540(a).

CONCLUSION

For the foregoing reasons, petitioner Diane L. Holbrook respectfully requests that this Court grants the petition for rehearing. The petition for rehearing should be granted because decision is entirely a question of law and is freely reviewable, in part, as case of first impression.

Respectfully submitted,

DIANE L. HOLBROOK
Petitioner
Post Office Box 1512
Hobe Sound, Florida 33475-1512
Telephone: (772) 545-9793

CERTIFICATE OF PETITIONER

Pursuant to Rule 44 of this Court's Rules, Petitioner certifies that the issues presented in this Petition for Rehearing concerns a substantial legal ground not previously presented to this Court. Petitioner further certifies that these issues, which raises an important question of constitutional jurisprudence and lower courts jurisdiction, is presented in good faith and not for delay.

This the 28th day of October, 2003.

DIANE L. HOLBROOK
Petitioner